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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ALEXANDER CALOR

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

On Petition For Writ Of Certiorari
To The United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner's spouse sought and obtained an *ex parte* Emergency Protective Order (EPO) that was served on Petitioner. The EPO restrained Petitioner's contact with his spouse and ordered Petitioner not to possess any firearms. The EPO also summoned Petitioner to appear at a hearing on February 12, 2001 in order to respond to the domestic violence allegations. On February 12, 2001, Petitioner retained temporary counsel, who appeared on behalf of Petitioner and requested a continuance of the scheduled hearing.

The questions presented are:

1. Does a court appearance wherein the court grants a continuance of the hearing constitute a "hearing" under 18 U.S.C. § 922(g)(8) when the result of the proceedings is the issuance of a second Emergency Protective Order, which is, by definition, an *ex parte* order?

2. Does an "Emergency Protective Order" constitute a valid warrant for the search and seizure of weapons under the Fourth Amendment?

3. Does the seizure of weapons, pursuant to an *ex parte* Emergency Protective Order, violate the due process requirements of the Fifth Amendment?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Alexander Calor, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit, which affirmed the conviction of Petitioner.

OPINIONS BELOW

The United States District Court for the Eastern District of Kentucky denied Petitioner's motion to dismiss his prosecution under 18 U.S.C. § 922(g)(8) and his motion to suppress evidence connected to his prosecution under 26 U.S.C. § 5861(d). The decision of the District Court is published as *United States v. Calor*, 172 F.Supp.2d 900 (E.D.Ky. 2001) and is reprinted in the Appendix at 1a. The opinion of the United States Court of Appeals for the Sixth Circuit affirming the denial of Petitioner's motion to dismiss and motion to suppress evidence is published as *United States v. Calor*, 340 F.3d 428 (6th Cir. 2003) and is reprinted in the Appendix at 13a.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit entered its opinion on August 15, 2003. App. 13a. On August 29, 2003, Petitioner filed a timely petition with the Sixth Circuit for a rehearing en banc. The Sixth Circuit denied Petitioner's rehearing petition on November 5, 2003. App. 21a. This Court's jurisdiction in invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. The Fifth Amendment to the United States Constitution provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

3. Section 922(g) of Title 18 of the United States Code provides in relevant part:

Unlawful acts

(g) It shall be unlawful for any person --

* * * * *

(8) who is subject to a court order that --

(A) was issued after a hearing of which such

person received actual notice, and at which such person had an opportunity to participate;
(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
(c) (i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or
(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury . . . .

* * * * *

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

4. Section 5861 of Title 26 of the United States Code provides in pertinent part:

Prohibited acts

It shall be unlawful for any person --

* * * * *

(d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record.

5. Section 3231 of Title 18 of the United States Code provides that "The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States."

6. Kentucky Revised Statutes § 403.740 provides in pertinent part:

Emergency Protective Order

(1) If, upon review of the petition, as provided for in KRS 403.735, the court determines that the allegations contained therein indicate the presence of an immediate and present danger of domestic violence and abuse, the court shall issue, upon proper motion, ex parte, an emergency protective order:

(a) Restraining the adverse party from any contact or communication with the petitioner except as directed by the court;

* * * * *

(d) Directing the adverse party to vacate the residence shared by the parties to the action;

* * * * *

(f) Enter other orders the court believes will be of assistance in eliminating future acts of domestic violence and abuse; or any combination thereof.

STATEMENT OF THE CASE

Petitioner, Alexander Calor ("Mr. Calor") and his wife, Dr. Mary Beth Calor ("Dr." or "Mrs. Calor") were residing in Harrison County, Kentucky when, on February 4, 2001, Mr. and Mrs. Calor experienced domestic difficulties, prompting Mrs. Calor to leave the marital residence the following day. Four days later, on Friday, February 9, 2001, Mrs. Calor filed a domestic violence petition in Harrison District Court against Mr. Calor. The Harrison District Court issued an *ex parte* Emergency Protective Order ("EPO"), which was served on Mr. Calor that same Friday evening by two deputies of the Harrison County, Kentucky, Sheriff's Office. App. 1a-2a.

The February 9, 2001 EPO provided that Mr. Calor was restrained from communications and contact with Mrs. Calor and ordered him to vacate the marital residence. An additional provision not included on the pre-printed EPO form ordered Mr. Calor "not to possess any firearms, turn all firearms into [the Harrison County] Sheriff's Office," and summoned Mr. Calor to appear at a hearing on Monday, February 12, 2001 to respond to the domestic violence allegations. App. 7a-8a.

At the time the EPO was served, Mr. Calor complied with the judge's order by turning over several firearms. Mr. Calor even assisted the deputies in locating and packing the contents of his extensive gun collection. These guns were seized by the deputy sheriffs. App. 8a. One of the weapons seized by the Harrison County Deputies was a Bushmaster .223 caliber rifle. The original barrel had been replaced with another of fewer than 16 inches in length, making it illegal, in violation of 26 U.S.C. § 5861, for Mr. Calor to possess the firearm without registering same pursuant to the National Firearms Registration and Transfer Record. App. 14a.

The February 9 EPO was to be in effect until February 12, 2001, which was the date set in the Order for a "full

hearing" required by Kentucky law in order to convert a temporary *ex parte* EPO into a Domestic Violence Order ("DVO") or duration for longer than fourteen (14) days. App. 2a. When Mr. Calor appeared at the courthouse on February 12, he asked for the assistance of John Lair ("Mr. Lair"), a local attorney whom Mr. Calor knew. Mr. Lair advised that he could not represent Mr. Calor because of a conflict but agreed to request a continuance of the hearing on behalf of Mr. Calor. Mr. Lair thereafter made a limited appearance on behalf of Mr. Calor, and the Harrison County District Court granted Mr. Lair's request for a continuance and adjourned the hearing until February 21, 2001. App. 5a.

Two days later, with the temporary EPO still in place, Mr. Calor returned to the marital residence. Although Mrs. Calor did not respond to Mr. Calor's knocks at the door, she did call the Harrison County Sheriff's Office, and two deputies returned to the marital residence to find Mr. Calor backing out of the driveway. A subsequent search of Mr. Calor's vehicle revealed four handguns, and the presence of a fifth handgun in the impounded vehicle was later reported by Mr. Calor's counsel. App. 14a-15a.

A domestic violence order ("DVO") was not entered until a March 7, 2001 hearing, at which time Mr. Calor agreed to entry of a DVO. The DVO was dismissed four (4) months later by agreement of the parties. Nonetheless, on July 12, 2001, a federal grand jury indicted Mr. Calor on one count of possessing a firearm in violation of title 18 of the United States Code, § 922(g)(8) (Count I), and one count of possessing a firearm in violation of title 26 of the United States Code, § 5861(d) (Count II). App. 2a. The district court's jurisdiction was based on 18 U.S.C. § 3231.

On September 17, 2001, the district court denied Mr. Calor's motion to dismiss his prosecution under 18 U.S.C. § 922(g)(8) for possession of five firearms while subject to an *ex parte* court order and his motion to suppress evidence

connected to his prosecution under 26 U.S.C. §5861(d) for possession of an unregistered Bushmaster .223 caliber rifle with an eleven and one-half inch barrel. App. 1a. The relevant facts were not disputed, so the district court did not hold an evidentiary hearing prior to ruling on Mr. Calor's motions.

A three-judge panel of the United States Court of Appeals for the Sixth Circuit affirmed the conviction of Mr. Calor. App. 12a. The Sixth Circuit then denied Mr. Calor's petition for rehearing en banc. App. 21a.

REASONS FOR GRANTING THE WRIT

This case implicates fundamental questions about the constitutionality of a search and seizure executed pursuant to an *ex parte* emergency protective order. In addition, this case provides an opportunity for this Court to address the confusion and inconsistency among the federal appellate courts that have construed the hearing requirement of 18 U.S.C. § 922(g)(8). Moreover, defining the minimum procedural requirements of a "hearing" has ramifications throughout procedural due process jurisprudence.

I. Emergency Protective Orders, When Used as the Basis for a Search and Seizure, Cause Constitutional Concerns

As in the instant controversy, state emergency protective orders often serve as the means by which state and local authorities seize firearms and other personal property without first obtaining a formal search warrant. Beyond the obvious Fourth Amendment concerns, the seizure of property by law enforcement agents, without first affording the party subject to the order an opportunity to be

heard, implicates due process protections.[1] Emergency protective orders, when used for searches and seizures, thus raise two important and recurring constitutional concerns.

A. Fourth Amendment

As this Court has recognized, the Fourth Amendment's prohibition against unreasonable searches and seizures is enforceable against the states through the Fourteenth Amendment. *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967). Emergency protective orders, issued by state courts, must therefore comply with the Fourth Amendment's constitutional requirements before they can serve as search warrants. Likewise, the exclusionary rule, which is "an essential part of both the Fourth and Fourteenth Amendments," applies to evidence obtained by state and local authorities pursuant to emergency protective orders failing to meet the minimum requirements of the Fourth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 657, 81 S.Ct. 1684, 1693, 6 L.Ed.2d 1081 (1961).

In the present case, the EPO issued by the Harrison District Court did not purport to authorize a search or seizure.[2] Nonetheless, it was pursuant to this EPO that a rifle, which is the subject of Petitioner's prosecution under 26 U.S.C. § 5861, was seized. As the district court noted, "Kentucky law provides broad authority for a trial judge,

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[1] As this Court has recognized, the seizure of property "implicates two 'explicit textual source[s] of constitutional protection,' the Fourth Amendment and the Fifth." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 50, 114 S.Ct. 492, 499 (1993) (citing *Soldal v. Cook County*, 506 U.S. 56, 70, 113 S.Ct. 538, 54*, 121 L.Ed.2d 450 (1992)).

[2] The EPO pursuant to which the Bushmaster rifle was seized reads as follows: "In order to assist in eliminating future acts of domestic violence and abuse: Defendant not to possess any firearms, turn all firearms in to the [Harrison County] Sheriff's Office." App. 1a.

upon ex parte petition of a victim of domestic violence, to enter any order necessary to protect the victim pending the later hearing on the merits for issuance of a DVO." App. 8a; *see also* KRS 403.740. Nonetheless, permitting boilerplate EPOs, such as the one in the instant controversy, to serve as search warrants ignores the Fourth Amendment's mandate that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Not only did the EPO in the instant controversy fail to authorize or direct the law enforcement agents to search or to seize property, but conspicuously absent from the EPO is any description of a place to be searched. Whether an EPO that simply orders a party not to possess any firearms and/or orders a party to relinquish possession of all firearms amounts to a valid search warrant is an issue yet to be determined by this Court.

Emergency protective orders are indisputably a proper and requisite means by which states can protect their citizens. This merit, however, cannot mask the mandates of the Fourth Amendment. Contrary to the district court's assertion that the EPO "necessarily includes the authority for the sheriff's department to enter the house to enforce ... the seizure of weapons provision," the Fourth Amendment requires that certain minimum requirements, including a description of the place to be searched, exist. App. 9a. This Court should therefore grant Petitioner's writ in order to aid state and local officials to meet the mandates of the Fourth Amendment when utilizing emergency protective orders as search warrants.

B. Fifth Amendment

This Court's precedents "establish the general rule that individuals must receive notice and an opportunity to be heard before the Government deprives them of property."

James Daniel Good Real Property , 510 U.S. 43, 48, 114 S.Ct. 492, 498, 126 L.Ed.2d 490 (1993). Petitioner was here deprived of property (namely, a firearm, the possession of which is a right protected by the Second Amendment) without first being afforded a hearing. Such deprivation is undoubtedly typical of emergency protective orders intended to prevent future acts of domestic violence.

Utilizing the familiar balancing test announced by this Court in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), the district court found that the privacy interest at stake was the right to enjoy a firearm collection during a three day period and that the risk of erroneous deprivation was slight since a full hearing was held approximately one month later. App 10a-11a. The district court also found that the government's interest in protecting a victim of domestic violence from further violence and potential death is great. *Id.*

What the district court and Sixth Circuit did not consider is that "[a person's] right to maintain control over his home, and to be free from government interference, is a private interest of historic and continuing importance." *James Daniel Good Real Property*, 510 U.S. at 48, 114 S.Ct. at 105. As this Court's holding in *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) announces, the fact that the government seizes personal property, as opposed to real property itself, does not somehow discount the value of this privacy interest. This case thus provides an opportunity for this Court to examine the magnitude of a personal interest in property, and, specifically, property that is protected by the Second Amendment.

Petitioner does not dispute the government's interest in "protecting a victim of domestic violence from further violence and potential death." App. 19a. The Sixth Circuit, however, failed to recognize that Petitioner was subject to a restraining order at the time of the seizure. Pursuant to the EPO, Petitioner was required to vacate the marital

residence, but the EPO was also used as a pre-hearing order by which Petitioner was forced to forfeit a property right.

This Court has stated that if a restraining order will serve the same purposes as a pre-hearing seizure, then the government cannot establish an existent circumstance sufficient to discard the Fifth Amendment. *James Daniel Good Real Property*, *supra*, 510 U.S. at 63, 114 S.Ct. at 506. The Sixth Circuit's holding thus conflicts with this Court's holding in *James Daniel Good*, and this Court should grant the petition to address the Sixth Circuit's departure from long-standing constitutional principles of this Court.

II. This Court Should Grant Review to Resolve Conflicting Interpretations of 18 U.S.C. § 922(g)(8) Among the Courts of Appeals.

Section 922(g)(8) of Title 18 of the United States Code prohibits possession of a firearm by a person subject to a domestic violence protective order, but *only if* that order "was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate . . . ." 18 U.S.C. § 922(g)(8). Several federal appellate courts have recently examined the construction of what is necessary to meet this hearing requirement, and the courts' holdings have attached different meanings to the statutory requirement. This Court should therefore grant review to resolve a burgeoning discrepancy in statutory interpretation among the courts of appeals.

In Petitioner's case, the Sixth Circuit examined the textual requirements of 18 U.S.C. § 922(g)(8) and found that the plain language of the statute required only an opportunity to be heard. The Sixth Circuit noted that the term "hearing" is ambiguous but nonetheless held that in the context of 18 U.S.C. § 922(g)(8) the meaning was plain. App. 17a. Under this interpretation, the statute "straightforwardly requires that the subject of the court order be given actual notice of the proceeding and an

opportunity to participate." *Id.* Thus, since the summons written into the EPO provided Petitioner the requisite notice and since Petitioner could have presented argument at the court proceeding, the Sixth Circuit held that the unambiguous requirements of § 922(g)(8) were satisfied. Since the requirements of the statute comport with due process, there was no need to "embellish the hearing requirements explicitly set forth." App. 18a.

The Seventh Circuit appears to have adopted a similar interpretation when examining the meaning of the hearing requirement of 18 U.S.C. § 922(g)(8). *United States v. Wilson*, 159 F.3d 280 (7th Cir. 1998). In *Wilson*, the Seventh Circuit concluded that a state court proceeding afforded to the defendant prior to entry of a plenary protection order provided him "'an opportunity to be heard at a meaningful time and in a meaningful manner.'" *Id.* at 289-90 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976)). No proof was taken in the state court proceeding in *Wilson*, but the protective order was explained to the defendant and he was asked if he could live by the order's terms. The defendant indicated that he could, and the order was entered. *Wilson*, 159 F.3d. at 290. The Seventh Circuit reasoned that, because Mr. Wilson could have told that judge that he disagreed with the order and given reasons for his disapproval, the defendant had "'the opportunity to present reasons, either in person or in writing, why the proposed action should not be taken.'" *Id.* (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546, 105 S.Ct. 1487, 1495, 84 L.Ed.2d 494 (1985)). Thus, the Seventh Circuit found that the explicit requirements of 18 U.S.C. § 922(g)(8) comport with minimum procedural due process protections.

In *United States v. Spruill*, 292 F.3d 207 (5th Cir. 2002) the Fifth Circuit also addressed the hearing requirement of 18 U.S.C. § 922(g)(8), and, in a detailed analysis, concluded that a foregone *opportunity* to be heard is *insufficient* to satisfy the statute if no hearing took place. In *Spruill*,

unlike the previous two cases above, the defendant never appeared before a court. Instead, Mr. Spruill met with a prosecutor, who explained the restraining order, as well as Mr. Spruill's right to obtain counsel, to object to entry of the order, and to appear before a judge. Nonetheless, Mr. Spruill agreed to the order and signed it.

The Fifth Circuit noted that the issue before it was not one of procedural due process but was instead whether the protective order was "within the scope of section 922(g)(8)(A)'s requirement that the order have been 'issued after a hearing at which such a person received actual notice.'" *Spruill*, 292 F.3d at 215. The Fifth Circuit rejected the government's argument that "hearing" means an "an opportunity to be heard, to present one's side of the case, or to be generally known or appreciated," a definition found in *Webster's Collegiate Dictionary* and relied upon by the Seventh Circuit in *Wilson*. *Id.* at 220. Instead, reasoned the Fifth Circuit, 18 U.S.C. § 922(g)(8) "points to a narrower, rather than a broader, meaning of 'hearing.'" *Id.*

This Court should grant review in order to examine the meaning of 18 U.S.C. § 922(g)(8) and whether it requires an "opportunity to be heard" or an actual "hearing." The Sixth and Seventh Circuits summarily found that the statute requires only an "opportunity to be heard," and lent most of their decisions to find that such an "opportunity to be heard" comports with due process. Petitioner, however, urges this Court to pursue the inquiry undertaken by the Fifth Circuit: what is the meaning, as used in 18 U.S.C. § 922(g)(8), of a hearing at which one must be afforded an opportunity to be heard? An opinion of this Court, stating the meaning of 18 U.S.C. § 922(g)(8) will end conflict and debate among the courts of appeals and will ensure that the same standard is applied to the thousands of criminal defendants prosecuted under this portion of the Violence Against Women Act.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted.

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February 2, 2004

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CRIMINAL ACTION NO. 01-63-KSF

UNITED STATES OF AMERICA, PLAINTIFF

V.

ALEXANDER T. CALOR, DEFENDANT

[Filed: Sep. 17, 2001]

ORDER

Presently before the Court is Defendant's motion to dismiss Count One of the Indictment [DE # 9] and Defendant's motion to suppress evidence [DE # 10]. Having been fully briefed, these matters are ripe for review.

I. FACTUAL AND PROCEDURAL BACKGROUND

On February 9, 2001, Mary Beth Calor filed a domestic violence petition in the Harrison District Court against her husband, Defendant Alexander T. Calor. The Harrison District Court issued an ex parte Emergency Protective Order ("EPO") pursuant to Kentucky law, restraining Calor from communication and contact with his wife. The EPO provided: "In order to assist in eliminating future acts of domestic violence and abuse; Defendant not to possess any firearms, turn all firearms over to the Sheriff's office." At

the time the EPO was issued, a Bushmaster firearm was seized by the Harrison County Sheriff's Department, pursuant to the judge's order in the EPO. The EPO was to be in effect until February 12, 2001, which was the date set in the Order for a hearing.

On February 12, a hearing did occur in Harrison District Court with the Defendant present. At the hearing, John Lair, Calor's retained counsel, made a limited appearance for purposes of requesting an extension of time. The Court extended the EPO and granted the Defendant an extension of time until February 21, 2001. However, on February 14, 2001, with the EPO still in place, Calor was found to be in possession of an H & K compact .45 caliber pistol, an H & K full size .40 caliber pistol, a a Glock model 21 .45 caliber pistol, and a Glock model 23 .40 caliber pistol, and these firearms were seized pursuant to the judge's instructions in the EPO. On March 7, 2001, another hearing was held in which a Domestic Violence Order ("DVO") was issued, which by its terms remained in effect until September 7, 2001. This DVO was dismissed by agreement of the parties on July 11, 2001.

Calor was indicted on July 12, 2001, charged with being in possession of firearms, in and affecting commerce, in violation of 18 U.S.C. § 922(g)(8)(A)(B) and (C)(ii) (possessing firearms while under a court order, issued after a hearing of which the Defendant had actual notice and had an opportunity to participate, that restrained the Defendant from harassing, stalking or threatening an intimate partner). Calor was also indicted on a second count, which charged him with violating 26 U.S.C. § 5861(d). This second count arose from the seizure on February 9, 2001 of the Bushmaster rifle, which the Harrison County Sheriff's Department found to be unregistered in the National Firearms Registration and Transfer Record, and with a barrel length of less than sixteen inches.

II. DEFENDANT'S MOTION TO DISMISS COUNT ONE

OF THE INDICTMENT

Count One of the Indictment charges Calor with unlawfully possessing a firearm while subject to a court order as described in 18 U.S.C. § 922(g)(8)(A)(B) and (C)(ii). Section 922(g)(8) provides in pertinent part:

> (g) It shall be unlawful for any person–
>
> . . .
>
> (8) who is *subject to a court order* that--
>
> (A) *was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate*;
>
> (B) restrains such person from harassing, stalking or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
>
> (C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or
>
> (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury . . .
>
> . . .
>
> to ship or transport in interstate or foreign commerce or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign

commerce. (emphasis added)

Calor moves to dismiss Count One of the Indictment on the grounds that the court order referred to in the Indictment was not issued after a hearing as required by 18 U.S.C. § 922(g)(8)(A). Specifically, Calor argues that the February 12, 2001 hearing for purposes of the issuance of an EPO does not satisfy the "hearing" requirements of § 922(g)(8)(A)[1]. Calor argues that since the February 12, 2001 EPO was entered against him without a hearing on the merits, the government is necessarily unable to prove an element of the offense and thus Count One of the Indictment must be dismissed with prejudice.

As a preliminary matter, the United States maintains that Calor's motion to dismiss is premature because the existence of a hearing affording an "opportunity to participate" is an element of the offense under 18 U.S.C. § 922(g)(8) and thus is a matter reserved for the jury under proper instruction. While it is true that the question of whether a hearing was held as required by 18 U.S.C. § 922(g)(8) is an element of the offense, in the context of this case, this is a determination that may be made by this Court. "Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion...." Fed.R.Crim.P. 12(b). The United States asserts that a hearing within the meaning of 18 U.S.C. § 922(g)(8) occurred on February 12, 2001. Calor submits that the record attached to his motion "clearly

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[1] Calor acknowledges that the Sixth Circuit has resolved the issue of the constitutionality of 18 U.S.C. § 922(g) based on a Commerce Clause challenge in *United States v. Napier*, 233 F.3d 394 (6th Cir.2000) and *United States v. Baker*, 197 F.3d 211 (6th Cir.1999). However, Calor wishes to preserve his argument that neither *Napier* nor *Baker* can be logically reconciled with *United States v. Morrison*, 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000) and *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995).

shows, in the Court's calendar notes, what occurred."[2] Therefore, there is no factual dispute concerning the pertinent events that occurred on February 12, 2001, and Calor's motion pertaining to the legal sufficiency of the hearing is capable of determination by this Court before trial.

Calor argues that the firearms violations in 18 U.S.C. § 922(g) are triggered only after the Defendant has had a hearing *on the merits* of the issuance of a final DVO. Calor submits the Harrison District Court calendar notes from the February 12, 2001 hearing, three days after the EPO was issued, which provide:

> (Lair [Calor's counsel] making limited appearance for the purpose of requesting extension of time) Cont. to 2/21/01 @ 11:00 a.m. @ request of [Calor] to obtain counsel; EPO extended w/ modification; [Calor's] permit to carry concealed weapon is surrendered--to be held in file pending further orders.
>
> /s/ William D. Probus
> Harrison District Judge

Contrary to Calor's contentions, the plain language of 18 U.S.C. § 922(g)(8)(A) requires only a "court order ... issued after a *hearing* of which such person received actual notice, and at which such person had an *opportunity* to participate." (emphasis added). Calor cites no authority interpreting this seemingly plain language to require a hearing on the merits. Likewise, Calor cites no authority for

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[2] Calor also acknowledges in his reply to the government's response to his motion to dismiss that "[t]he audio tape recording of the Court proceedings is also available and does not contradict the written record." Thus, it is unnecessary for this Court to hold a hearing or to delve beyond the written record of the February 12, 2001 proceedings.

the proposition that the statute, or due process for that matter, imposes different requirements on a hearing for purposes of issuing an EPO than on a hearing for purposes of issuing a DVO. In fact, Calor acknowledges that the only cases interpreting the statute cited in his motion to dismiss both require the issuance of an order merely after a hearing of which the Defendant received actual notice and at which he had an opportunity to participate. *See United States v. Baker*, 197 F.3d 211 (6th Cir.1999).

The Sixth Circuit has not yet addressed the meaning of the hearing requirement for purposes of this statute. However, the Seventh Circuit has interpreted the above "hearing" and "opportunity to participate" requirement in *United States v. Wilson* , 159 F.3d 280 (7th Cir.1998). In *Wilson*, the defendant was subject to an EPO and was charged with illegally possessing weapons in violation of 18 U.S.C. § 922(g)(8). *Id.* at 284. The *Wilson* defendant then participated in a hearing without the benefit of counsel, in which a "plenary order"[3] was issued against him without the court taking any evidence. *Id. Wilson* found that the defendant had a "hearing" and "opportunity to participate" as required by 18 U.S.C. § 922(g)(8)(A) despite the fact that the defendant proceeded pro se, no evidence was taken; and the defendant did not object to the order issued. *Id.* at 290. Due process was satisfied because the defendant received "notice of the hearing at a meaningful time and had an opportunity to participate in a meaningful manner." *Id.*

Here, Calor clearly had notice of the hearing to extend the EPO. Calor was served on February 9, 2001, and

---

[3] A Plenary Order under Illinois law is issued for a two year period and appears to be equivalent to a Kentucky Domestic Violence Order. However, the terminology of the court order or the length of time in which it is in place does not alter the language of 18 U.S.C. § 922 merely requiring a "court order." Thus, the reasoning of Wilson applies with equal force to Calor's EPO.

appeared for the hearing in Harrison District Court on February 12, 2001. The fact that Calor's counsel only made a "limited appearance" and convinced the Court to grant an extension of time does not alter the fact that a hearing occurred and the Defendant had an "opportunity to participate." The Seventh Circuit has held that defendants may have an "opportunity to participate" in the hearing for purposes of 18 U.S.C. § 922(g)(8)(A) regardless of the presence of counsel. *Id.* Calor has a college education and M.B.A.; he was certainly competent to articulate objections to the EPO without the presence of counsel. Calor received actual notice of the hearing; it was held at a meaningful time before his liberty interest was interfered with (i.e., before weapons charges were filed); and in a meaningful manner.

Calor's would-be imposition of a hearing on the merits requirement into 18 U.S.C. § 922(g)(8)(A), a statute that otherwise merely requires an "opportunity to participate" in the hearing, is problematic beyond the obvious attempt at a judicial "rewriting" of the statute. Such a "hearing on the merits" requirement would allow a defendant/respondent subject to an EPO order to forestall federal firearm charges by moving to continue the hearing, or merely failing to show up for the hearing. *Cf. United States v. Bunnell* , 106 F.Supp.2d 60, 66 (D.Maine, 2000) (rejecting due process challenge to 18 U.S.C. § 922(g)(8)(A) by defendant who was given actual notice of hearing but failed to attend). Instead, this Court finds that Calor had notice of the hearing that occurred at a meaningful time, and Calor had the *opportunity* to participate in the hearing. Calor's motion to dismiss Count One is denied.

III. DEFENDANT'S MOTION TO SUPPRESS

On February 9, 2001, Harrison County deputy sheriffs served the EPO on Calor. In addition to restraining Calor from coming about his wife and from committing acts of

domestic violence, the EPO also contained the following provision:

> In order to assist in eliminating future acts of domestic violence and abuse; Defendant not to possess any firearms, Turn all firearms in to H/C Sheriff's Office. [sic].

At the time the EPO was served, the deputy sheriffs seized Calor's firearms, and Calor complied with the judge's order by turning over certain firearms, including the Bushmaster gun that is the subject of this motion.

Calor now argues that the seizure of firearms was made without a search warrant at his house, in the absence of exigent circumstances, and thus an unreasonable seizure violative of the Fourth Amendment. Calor also moves that all oral statements made by him in connection with the alleged warrantless seizure constitute fruit of the poisonous tree and should also be suppressed.

Kentucky law provides broad authority for a trial judge, upon ex parte petition of a victim of domestic violence, to enter any order necessary to protect the victim pending the later hearing on the merits for issuance of a DVO. Specifically, in addition to the order restraining the Defendant from committing further acts of domestic violence and abuse, the trial court may, *inter alia*, "[e]nter other orders the court believes will be of assistance in eliminating future acts of domestic violence and abuse; or any combination thereof." K.R.S. § 403.740(1)(f). The EPO in this case specifically provides that the seizure of the weapons was "[i]n order to assist in eliminating future acts of domestic violence and abuse," which are enumerated criteria for the issuance of an EPO pursuant to K.R.S. 403.740(1)(b) & (f). Clearly, the Harrison District Court was acting within the framework of the Kentucky statute when ordering seizure of the firearms on February 9, 2001. Moreover, the EPO provided that Calor was to vacate the

residence located at "Rt. # 5, Box 4765B, Carl Stevens Rd., Cynthiana, Ky." The EPO thus necessarily includes the authority for the sheriff's department to enter the house to enforce this provision as well as the seizure of the weapons provision. Therefore, the deputy sheriffs were acting pursuant to a valid search warrant, issued by the terms of a constitutional statute, when the Bushmaster weapon was seized.

Calor argues in the alternative that even if the sheriffs were acting under authority to seize the weapon, such seizure without a *prior* hearing violates due process. However, contrary to Calor's contention, due process does not categorically require a hearing before one is initially deprived of a property interest. Instead, the timing of a hearing (i.e., whether a hearing is required pre- or post-deprivation) is determined on a sliding scale that requires balancing the impact the taking has on the individual and the state interest being advanced. *See Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). Calor confuses the line of cases, including *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972), which stand for the proposition that a hearing must be had before one is finally deprived of his property. These cases "do not deal at all with the need for a predetermination hearing where a full and immediate post- termination hearing is provided." *Parratt*, at 540, 101 S.Ct. 1908.[4]

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[4] Calor notes that *Parratt v. Taylor* was "overruled substantially by *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). However, Calor fails to point out that the portion of Parratt overruled was its holding that a due process property interest was implicated by the *negligent* act of a state official. *Parratt* at 334-35, 101 S.Ct. 1908. Now, after Daniels, the sliding scale due process right to a hearing only applies to intentional governmental deprivations of life, liberty or property. *Id.* Thus, *Daniels* does not weaken *Parratt* in any way relevant to this case.

The Supreme Court has upheld pre-hearing seizure of property in situations requiring "either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking...." *Id.* (citing *Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974)). "(D)ue process is flexible and calls for such procedural protections as the particular situation demands." *Mathews*, at 335, 96 S.Ct. 893 (1976) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)). The familiar *Mathews v. Eldridge* balancing test requires consideration of three factors: the private interest that will be affected by the official action; the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and the Government's interest in foregoing additional procedural requirements. *See Mathews* at 335, 96 S.Ct. 893.

Here, the Defendant's private interest at stake is, in essence, the property right to enjoy his firearm collection during the three day period of time between seizure of the guns on February 9, 2001 and the hearing that occurred on February 12. The risk of an erroneous deprivation of Calor's property rights in this context is slight, considering that the hearing held three days later and the hearing on the merits held March 7, 2001 to issue the Domestic Violence Order provided a meaningful and timely means by which to assess the pre-hearing deprivation of property. The government's interest in this case, namely protecting a victim of domestic violence from further violence and potential death, is certainly great. This government interest is further magnified by the "necessity of quick action" to remove the weapons, the means of perpetrating violence or death on Mrs. Calor, from the Defendant's possession. Clearly, the potential for grave injury and loss of life at stake in this

pre-hearing deprivation of property case provide a stronger government interest than prior pre-hearing deprivation cases in which the government interest was merely economic. *See, e.g., Bowles v. Willingham*, 321 U.S. 503, 64 S.Ct. 641, 88 L.Ed. 892 (1944) (approving pre-hearing rent control orders by government in face of due process challenge); *cf. Corn Exchange Bank v. Coler*, 280 U.S. 218, 50 S.Ct. 94, 74 L.Ed. 378 (1930) (approving statute providing for seizure of property of absconding husband and father upon ex parte warrant, without a predeprivation hearing). Calor's due process argument for the suppression of the evidence of the illegal Bushmaster firearm and his statements made in connection therewith is denied.

IV. CONCLUSION

Accordingly, the Court, being otherwise fully and sufficiently advised, HEREBY ORDERS that

(1) Defendant's motion to dismiss Count One of the Indictment [DE # 9] is DENIED;

(2) Defendant's motion to suppress evidence [DE # 10] is DENIED.

/s/ Karl S. Forester
Karl S. Forester, Chief Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 02-5099

UNITED STATES OF AMERICA, Plaintiff-Appellee

v.

ALEXANDER CALOR, Defendant-Appellant

On Appeal from the United States District Court
for the Eastern District of Kentucky at Lexington.

[Filed: August 15, 2003]

Before: KENNEDY, GILMAN, and GIBBONS, Circuit Judges

JUDGMENT

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the district court's disposition of defendant Alexander Calor's motions pursuant to 18 U.S.C. § 922(g)(8) and 26 U.S.C. § 5861(d) is AFFIRMED. IT IS FURTHER ORDERED that defendant Calor's conviction is AFFIRMED.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green
Leonard Green, Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 02-5099

UNITED STATES OF AMERICA, Plaintiff-Appellee

v.

ALEXANDER CALOR, Defendant-Appellant

Appeal from the United States District Court
for the Eastern District of Kentucky at Lexington.
No. 01-00063–Karl S. Forester, Chief District Judge

[Argued: July 31, 2003]

[Decided and Filed: August 15, 2003]

Before: KENNEDY, GILMAN, and GIBBONS, Circuit Judges

OPINION

KENNEDY, Circuit Judge. Alexander Calor appeals the district court's denial of his motion to dismiss his prosecution under 18 U.S.C. § 922(g)(8) for possession of five firearms while subject to a court order, and its denial of his motion to suppress evidence connected to his prosecution under 26 U.S.C. § 5861(d) for possession of an unregistered Bushmaster .223 caliber rifle with an eleven and one-half inch barrel. We **AFFIRM** the district court's disposition of both motions.

I.

On Friday, February 9, 2001, Mary Beth Calor, Alexander Calor's wife, sought and obtained an ex parte Emergency Protective Order (EPO). The EPO was served on Mr. Calor at the Calors' residence on the evening of February 9 by two Harrison County deputy sheriffs. The EPO restrained Mr. Calor from contacting Mrs. Calor, ordered Mr. Calor to vacate the marital residence, ordered Mr. Calor "not to possess any firearms, turn all firearms into [Harrison County] Sheriff's Office," and summoned Mr. Calor to appear at a hearing on Monday, February 12, 2001 at 11:00 a.m. to respond to domestic violence allegations. The EPO was effective through February 12, 2001. Calor allowed the deputy sheriffs who served the EPO to retrieve a quantity of guns, including a Bushmaster .223 caliber rifle with an eleven and one-half inch barrel.

On February 12, 2001, Mr. Calor retained temporary counsel to request an adjournment of the scheduled hearing. The court granted the request and adjourned the hearing until February 21, 2001. The court did not take any testimony from sworn witnesses and no other evidence was presented, but it did address some collateral matters raised by Mrs. Calor's counsel and issued a second EPO that was effective through February 21, 2001.[1]

On February 14, 2001, Mr. Calor violated the EPO by returning to the marital residence. Mrs. Calor reported Mr. Calor's violation to the Harrison County Sheriff's Office. The deputy sheriffs who responded to Mrs. Calor's complaint observed Mr. Calor leaving the residence and

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[1] In addition to the terms of the first EPO, the second EPO restrained Mr. Calor from coming into the city of Cynthiana except to see his attorney and for court appearances, required him to stay away from his wife's place of employment and his daughter's daycare, and provided that a list of Mr. Calor's clothing and personal belongings be given to Mrs. Calor's attorney and that Mr. Calor could retrieve these items from the Harrison County Sheriff's Office.

arrested him. A search of his vehicle revealed four handguns. Mr. Calor's counsel later reported the presence of a fifth handgun in the impounded vehicle.

On July 12, 2001, a federal grand jury indicted Defendant on one count of possessing a firearm in violation of title 18 of the United States Code, § 922(g)(8) (Count I), and one count of possessing a firearm in violation of title 26 of the United States Code, § 5861(d) (Count II). Calor was convicted on both counts by a jury.

II.

Calor's appeal presents two distinct issues. The first issue is whether the February 12 court proceeding before the state trial judge provided the predicate hearing necessary to render the February 12 EPO a court order within the meaning of § 922(g)(8). The second issue is whether the deputy sheriffs lawfully seized the Bushmaster .223 caliber rifle for the purposes of a criminal prosecution. Because the relevant facts were not disputed, the district court did not hold an evidentiary hearing prior to ruling on Calor's motions. The district court's denial of the motion to dismiss and intertwined statutory construction present questions of law that are reviewed de novo. United States v. Stewart, 306 F.3d 295, 331 (6th Cir.2002). Likewise, the district court's denial of the motion to suppress evidence is reviewed de novo. United States v. Pelayo-Landero, 285 F.3d 491, 494 (6th Cir.2002).

A.

Calor argues that the district court erred when it denied his motion to dismiss because the court order upon which his prosecution under § 922(g)(8) is based was not issued after a hearing that is within the scope of § 922(g)(8). That statutory section makes it unlawful for any person:

> (8) who is subject to a court order that--
> (A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;
> (B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
> (C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or
> (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury;
> . . .
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped in interstate or foreign commerce.

This Circuit has upheld the constitutionality of § 922(g)(8). *United States v. Napier* , 233 F.3d 394 (6th Cir.2000) (holding that § 922(g)(8) does not violate Due Process and Commerce clauses, or Second Amendment), *United States v. Baker*, 197 F.3d 211 (6th Cir.1999) (holding that § 922(g)(8) does not violate Due Process or Commerce clauses). The construction of what is necessary to meet the hearing requirement, however, presents a question of first impression.

"In all cases of statutory construction, the starting point is the language employed by Congress. Where the statute's language is plain, the sole function of the courts is enforce it according to its terms." *Vergos v. Gregg's Enters., Inc.* ,

159 F.3d 989, 990 (6th Cir.1998) (internal quotation marks and citations omitted). "The court must look beyond the language of the statute, however, when the text is ambiguous or when, although the statute is facially clear, a literal interpretation would lead to internal inconsistencies, an absurd result, or an interpretation inconsistent with the intent of Congress." *Id.*

The parties contend that the term "hearing" is ambiguous. While we agree that the term has not been given a consistent meaning in federal law and its construction has been context dependent, the term is not ambiguous in this context. In order for a court proceeding to be the predicate hearing for a court order that triggers the § 922(g)(8) firearm disability, the statute straightforwardly requires that the subject of the court order be given actual notice of the proceeding and an opportunity to participate. In this case, the actual notice requirement is satisfied by the summons written into the EPO that was served on Calor on the evening of February 9. The opportunity to participate requirement is satisfied because Calor could have presented reasons why the court should not enter an order finding that he posed a credible threat to the safety of his wife or child at the February 12 court proceeding. That Calor elected to waive his opportunity to participate does not does not alter his status under § 922(g)(8). The second EPO, which was issued at the conclusion of the February 12 court appearance, provided the predicate court order for Calor's prosecution for possessing the five firearms in violation of § 922(g)(8).

Our reading of § 922(g)(8) is consistent with that of the Seventh Circuit. *United States v. Wilson*, 159 F.3d 280 (7th Cir.1998), considered a due process challenge to defendant's conviction under § 922(g)(8). The court concluded that the state court proceeding afforded to Wilson prior to entry of the plenary protection order against him provided " 'an opportunity to be heard at a meaningful time and in a meaningful manner.' " *Id.* at 289-90 (quoting *Mathews v.*

Eldridge, 424 U.S. 319, 348, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)). Defendant had an opportunity to be heard in a meaningful manner because, even though no proof was presented, he had " 'the opportunity to present reasons, either in person or in writing, why proposed action should not be taken.' " Id. at 290 (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 52, 546, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985)). Given that the minimum requirements of the statute comport with the requirements of due process, we follow the Seventh Circuit in declining to embellish the hearing requirements explicitly set forth in § 922(g)(8). Consequently, we affirm the district court denial of Calor's motion to dismiss his prosecution under 18 U.S.C. § 922(g)(8) for possession of five firearms while subject to a court order.[2]

B.

Calor next argues that the district court erred when it denied his motion to suppress the evidence of his possession of an unregistered firearm because the February 9 EPO cannot constitute a valid search warrant under the Fourth Amendment and the pre-hearing seizure of the firearms violates constitutional due process requirements.

With respect to Calor's Fourth Amendment challenge to the validity of the EPO as a search warrant, the district court found that an EPO necessarily includes the authority for the sheriff's department to enter a residence to enforce the seizure-of-weapons provision. As such, the district court found that "the deputy sheriffs were acting pursuant to a

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[2] Calor's reliance on *United States v. Spruill*, 292 F.3d 207 (5th Cir.2002), is misplaced. The domestic violence order at issue in *Spruill* did not fall within the scope of § 922(g)(8) because it was entered by agreement of the parties, but without the parties appearing before a judge at a noticed hearing. *Id.* at 219-20.

valid search warrant, issued by the terms of a constitutional statute, when the Bushmaster weapon was seized." This claim, however, fails on narrower grounds because Calor does not argue that the deputy sheriffs' entry into his residence and retrieval of his guns for transportation to the Harrison County Sheriff's Office was done without his permission. *United States v. Elkins*, 300 F.3d 638, 647 (6th Cir.2002) (" 'A search may be conducted without a warrant if a person with a privacy interest in the [place] to be searched gives free and voluntary consent.' ") (quoting *United States v. Riascos-Suarez*, 73 F.3d 616, 625 (6th Cir.1996)). In fact, at trial, Calor testified that he complied with the order, albeit reluctantly, and that he helped the deputies pack up his firearms. Had Calor denied the deputy sheriffs permission to enter and the deputies relied on the EPO to search for and seize Calor's guns, we then would have a basis for considering whether an EPO, which requires the removal of an alleged domestic abuser and his firearms from the home, is a valid search warrant under the Fourth Amendment.

With respect to Calor's due process challenge to the seizure of his firearms, the district court found that Calor's argument failed because, under the balancing test articulated in *Mathews v. Eldridge*, 424 U.S. 319, 329, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), Kentucky's interest in protecting the victims of domestic violence from further violence, and possibly death, outweighed Calor's interest in maintaining possession of his firearms during the brief period between seizure and a hearing, and that the risk of an erroneous deprivation of property rights was small. The district court's balancing of the relative interests appropriately assigns greater weight to the government's interest in protecting an alleged domestic violence victim from gun violence and possible death after an alleged abuser has been served an EPO than to a gun owner's brief loss of possession. Consequently, we affirm the district court's denial of Calor's motion to suppress the evidence of

his possession of an illegal rifle.

III.

For the foregoing reasons, we affirm the district court's denial of Calor's motion to dismiss his prosecution under 18 U.S.C. § 922(g)(8) for possession of five firearms while subject to a court order. We also affirm the district court's denial of Calor's motion to suppress evidence connected to his prosecution under 26 U.S.C. § 5861(d) for possession of an unregistered Bushmaster .223 caliber rifle with an eleven and one-half inch barrel. Calor's conviction is affirmed.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 02-5099

UNITED STATES OF AMERICA, Plaintiff-Appellee

v.

ALEXANDER CALOR, Defendant-Appellant

[Filed: Nov. 5, 2003]

Before: KENNEDY, GILMAN, and GIBBONS, Circuit Judges

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other actives judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
/s/ Leondard Green
Leonard Green, Clerk

(2)

Supreme Court, U.S.
FILED
APR 9 - 2004
OFFICE OF THE CLERK

No. 03-1140

In the Supreme Court of the United States

ALEXANDER CALOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

1. Whether the confiscation of petitioner's weapons pursuant to an emergency protective order was an unlawful seizure under the Fourth Amendment or a deprivation of property without due process under the Fifth Amendment.

2. Whether an emergency protective order, entered at a proceeding in which petitioner appeared through counsel and requested an extension of time, was issued after a "hearing" under 18 U.S.C. 922(g)(8)(A).

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In the Supreme Court of the United States

No. 03-1140

ALEXANDER CALOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 13a-20a) is reported at 340 F.3d 428. The opinion of the district court (Pet. App. 1a-12a) is reported at 172 F. Supp. 2d 900.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 2003. A petition for rehearing was denied on November 5, 2003. Pet. App. 21a. The petition for a writ of certiorari was filed on February 3, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner

was convicted of possession of a firearm while subject to a domestic violence protection order, in violation of 18 U.S.C. 922(g)(8) (Count 1), and possession of an unregistered rifle with a barrel length of less than 16 inches, in violation of 26 U.S.C. 5861(d) (Count 2). He was sentenced to 24 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 13a-20a.

1. On February 9, 2001, petitioner's wife sought an ex parte Emergency Protective Order (EPO) against petitioner. The petition for the EPO averred that petitioner had struck his spouse with a metal curtain rod on her right arm and left leg; that he had thrown a hammer at her, bruising her right ankle; and that their 19-month-old daughter had witnessed the violence from her crib. The petition also recited that petitioner had hit his spouse's face with his fist, had pulled a gun on her, and on numerous occasions had threatened to kill her and "inferred jeopardy" to their child. C.A. App. 49. On February 9, 2001, the Harrison County District Court issued an ex parte EPO, effective through February 12, 2001, that ordered petitioner not to contact his wife, to vacate the marital residence, and "not to possess any firearms, turn all firearms into [Harrison County] Sheriff's Office." *Id.* at 264; Pet. App. 14a. The EPO indicated that the firearms prohibition was necessary "[i]n order to assist in eliminating future acts of domestic violence and abuse." C.A. App. 264. The EPO also summoned petitioner to appear at a hearing on February 12, 2001, to respond to the domestic violence allegations in the EPO petition. *Ibid.* The EPO was served on petitioner at the marital residence on the evening of February 9, 2001, by two Harrison County deputy sheriffs. Petitioner directed the deputy sheriffs to his gun collection and allowed them to retrieve a

number of guns, including a Bushmaster .223 caliber rifle with an eleven and one-half inch barrel. Pet. App. 14a.

On February 12, 2001, a hearing occurred with petitioner present. At the hearing, petitioner's retained counsel made a limited appearance to request an extension of time. The court granted petitioner's request and extended the EPO until February 21, 2001. Pet. App. 2a, 14a. The EPO recited that petitioner had been provided "notice and opportunity to be heard" and that the court "having reviewed the petition and being sufficiently advised finds that the allegations indicate an immediate and present danger of domestic violence and abuse." C.A. App. 44. The EPO, in addition to the terms of the first EPO, restrained petitioner from coming into the city of Cynthiana except to see his attorney and for court appearances, and required him to stay away from his wife's place of employment and his daughter's daycare. Pet. App. 14a & n.1; Gov't C.A. Br. 3-4.

On February 14, 2001, petitioner violated the EPO by returning to the marital residence. Petitioner's wife reported the violation to the Harrison County Sheriff's Office. The deputy sheriffs who responded to the complaint observed petitioner leaving the residence and arrested him. They searched his vehicle and found four handguns. Petitioner's counsel later reported the presence of a fifth handgun in the impounded vehicle. Pet. App. 14a-15a.

2. On July 12, 2001, a federal grand jury indicted petitioner on one count of possessing a firearm while subject to a domestic violence restraining order, in violation of 18 U.S.C. 922(g)(8) (Count 1), and one count of possessing a firearm with a barrel length of less than 16 inches that was not registered to him in the National

Firearms Registration and Transfer Record, in violation of 26 U.S.C. 5861(d) (Count 2).

a. Section 922(g) of Title 18 provides that specified categories of persons may not "ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition." Section 922(g)(8) imposes that prohibition on any person

> who is subject to a court order that—
>
> (A) was issued after a hearing of which such person received actual notice and at which such person had an opportunity to participate;
>
> (B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear or bodily injury to the partner or child; and
>
> (C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or
>
> (ii) by its terms explicitly prohibits the use, attempted use or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury[.]

18 U.S.C. 922(g)(8).

Petitioner moved to dismiss Count One of the indictment on the ground that the court order mentioned in the indictment, the EPO issued on February 12, 2001, and in effect through February 21, 2001, was not issued after a hearing as required by 18 U.S.C. 922(g)(8)(A). Pet. App. 4a. The district court rejected petitioner's claim that Section 922(g)'s prohibition was triggered

only after a defendant has had a hearing on the merits of the issuance of a final domestic violence order. The court concluded that the plain language of Section 922(g)(8)(A) requires only a "court order * * * issued after a *hearing* of which such person received actual notice, and at which such person had an *opportunity* to participate." Pet. App. 5a (quoting 18 U.S.C. 922(g)(8)(A)). The court found that the fact that petitioner's counsel only made a limited appearance on February 12, 2001, and convinced the court to grant an extension of time did not alter the conclusion that a hearing occurred and that petitioner had an "opportunity to participate." *Id.* at 7a. The court further explained that "[s]uch a 'hearing on the merits' requirement would allow a defendant/respondent subject to an EPO order to forestall federal firearm charges by moving to continue the hearing, or merely failing to show up for the hearing." *Ibid.*

b. Petitioner also moved to suppress the Bushmaster gun seized on February 9, 2001, on the ground that its confiscation constituted a warrantless seizure in violation of the Fourth Amendment, and, in the alternative, that such seizure without a prior hearing violated due process. C.A. App. 54-57. The district court denied the motion. As to petitioner's Fourth Amendment challenge, the court found that Kentucky law provided broad authority for a judge entertaining an ex parte domestic violence petition to enter any order necessary to protect the victim pending the later hearing on the merits, and that the Harrison District Court was acting within the framework of that law when it ordered the seizure of the firearms and petitioner's removal from the marital residence. Pet. App. 8a-9a. The court found that "[t]he EPO thus necessarily includes the authority for the sheriff's department to

enter the house to enforce" the EPO, and that "the deputy sheriffs were acting pursuant to a valid search warrant * * * when the Bushmaster weapon was seized." *Id.* at 9a.

As to petitioner's due process challenge, the district court applied the balancing test articulated by this Court in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), for determining the propriety of a pre-hearing seizure of property. The court found that Kentucky's interest in protecting victims of domestic abuse from further injury or loss of life outweighed petitioner's interest in maintaining possession of his firearms until a hearing, and that the risk of an erroneous deprivation of petitioner's property rights was slight. Pet. App. 10a-11a.

Following the denial of his motions to dismiss and to suppress, petitioner proceeded to trial and was convicted on both counts.

3. The court of appeals affirmed. Pet. App. 13a-20a. The court affirmed the district court's denial of petitioner's motion to dismiss the indictment, holding that the EPO upon which his prosecution under Section 922(g)(8) was based was issued after a hearing. Pet. App. 15a-18a. The court found that to trigger Section 922(g)(8)'s firearm disability, the statute "straightforwardly requires that the subject of the court order be given actual notice of the proceeding and an opportunity to participate." Pet. App. 17a. The court found that the actual notice requirement was satisfied by the summons written into the EPO served on petitioner on February 9, 2001. *Ibid.* The court found that "[t]he opportunity to participate requirement [was] satisfied because [petitioner] could have presented reasons why the court should not enter an order finding that he posed a credible threat to the safety of his wife or child at the February 12 court proceeding." *Ibid.*

The court also affirmed the district court's denial of petitioner's motion to suppress, rejecting petitioner's Fourth Amendment and Fifth Amendment due process challenges to the February 9, 2001, pre-hearing seizure of the Bushmaster gun. Pet. App. 18a-20a. The court determined that it had no occasion to consider whether an EPO requiring the removal of an alleged domestic abuser and his firearms from the home amounted to a valid search warrant under the Fourth Amendment. The court concluded that petitioner's claim failed on "narrower grounds" because petitioner "does not argue that the deputy sheriffs' entry into his residence and retrieval of his guns * * * was done without his permission." *Id.* at 19a. The court observed that petitioner at trial had testified that "he complied with the order, albeit reluctantly, and that he helped the deputies pack up his firearms." *Ibid.*

The court also rejected petitioner's due process challenge to the seizure of his firearms. Pet. App. 19a-20a. The court held that, in balancing the respective private and government interests, the district court had appropriately assigned greater weight to the State's interest in protecting an alleged domestic violence victim from gun violence and possible death than to petitioner's pre-hearing loss of possession of his firearms. *Id.* at 19a.

ARGUMENT

1. Petitioner contends (Pet. 7-11) that the pre-hearing seizure of his weapon on February 9, 2001, violated the Fourth Amendment and his Fifth Amendment Due Process rights. The court of appeals correctly rejected those claims.

a. Petitioner argues (Pet. 8-9) that the February 9, 2001, EPO did not constitute a search warrant under the Fourth Amendment. That issue is not properly

presented in this case because the court of appeals correctly declined to reach it. As the court explained, petitioner did not argue that the officers lacked his permission to enter his residence to retrieve his weapon. Pet. App. 19a. Rather, petitioner allowed the officers who served the order on him to enter his home, directed them to his gun collection, and allowed them to retrieve his weapons. Petitioner testified at trial that "he complied with the order, albeit reluctantly" and "helped the deputies pack up his firearms." *Ibid.* Furthermore, Deputy Sheriff Paul Olin testified that the officers had petitioner's "complete consent" to search the house. C.A. App. 116. Under those circumstances, the entry to obtain the weapons was justified by consent, whether or not the EPO independently functioned as a warrant.

b. Petitioner also argues (Pet. 9-11) that the February 9, 2001, pre-hearing seizure of his weapon deprived him of his property without notice and an opportunity to be heard, in violation of his due process rights. The court of appeals correctly rejected that contention.

Due process requires the government to provide notice and a meaningful opportunity to be heard when it deprives a person of a property interest protected by the Constitution. *Mathews* v. *Eldridge*, 424 U.S. at 333; *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Due process, however, "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Mathews*, 424 U.S. at 334 (quoting *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895 (1961)). Rather, it "calls for such procedural protections as the particular situation demands." *Ibid.* (quoting *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972)). The requirements of due process do not always require a

pre-deprivation opportunity to be heard, but may be satisfied through a post-deprivation hearing in cases in which there is a need for prompt governmental action. See *United States* v. *James Good Real Prop.*, 510 U.S. 43, 53 (1993); *FDIC* v. *Mallen*, 486 U.S. 230, 240 (1988); *Parratt* v. *Taylor*, 451 U.S. 527, 539 (1981); *Fuentes* v. *Shevin*, 407 U.S. 67, 82 (1972).

The Court has held that pre-hearing seizures requiring "either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking, can satisfy the requirements of procedural due process." *Parratt*, 451 U.S. at 539. The balancing test set forth in *Mathews*, 424 U.S. at 335, looks to the private interest affected by the government action, the risk that the procedure used will result in an erroneous deprivation of such interest and the probable value of additional or other procedural safeguards, and the government's interest and burdens that additional procedural requirements would entail.

The court of appeals correctly concluded that the government's interest in protecting a victim of domestic violence from further violence and potential death strongly outweighed petitioner's interest in the right to enjoy his firearm collection during the three-day period between the February 9 seizure and the scheduled February 12 hearing. There was no serious risk in the circumstances of this case that petitioner would be erroneously deprived of his property rights. Petitioner's wife had sworn under oath that petitioner had struck her with a metal curtain rod and hammer, hit her in the face with his fist, pulled a gun on her, threatened

to kill her on numerous occasions, and "inferred jeopardy" to their child. C.A. App. 49.[1]

Petitioner was provided a meaningful opportunity to contest any deprivation of property both on February 12, 2001, and when another hearing was held on March 7, 2001, in which a final Domestic Violence Order was issued against petitioner. Pet. App. 2a. Given the necessity of quick action to remove petitioner's weapons, the pre-hearing seizure was constitutional. See, *e.g.*, *Dixon* v. *Love*, 431 U.S. 105 (1977) (upholding state's summary revocation of driver's license for repeated traffic offenses); *Ewing* v. *Mytinger & Casselberry, Inc*, 339 U.S. 594 (1950) (upholding summary pre-hearing seizure and destruction of misbranded drugs); *North American Cold Storage Co.* v. *City of Chicago*, 211 U.S. 306 (1908) (upholding pre-hearing seizure and destruction of unwholesome food because the possibility of erroneous destruction was outweighed by the public health emergency and the owner could recover damages in a later action); *Miller* v. *City of Philadelphia*, 174 F.3d 368 (3d Cir. 1999) (upholding child custody proceedings by *ex parte* order where child's safety endangered); *Jordan* v. *Jackson*, 15 F.3d 333, 343 (4th Cir. 1994) ("requirements of process may be delayed where emergency action is necessary to avert imminent harm to a child * * * provided that adequate post-

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[1] Petitioner argues (Pet. 10) that his right to possess his firearm was protected by the Second Amendment. Petitioner waived that contention, however, by not raising it before the court of appeals. Moreover, petitioner's contention of a heightened interest in possessing his firearm is belied by his actions at the February 12, 2001, hearing that was held three days following retrieval of the weapon by the officers. Far from contesting the deprivation of the firearm, petitioner sought a postponement of the hearing.

deprivation process to ratify the emergency action is promptly accorded").[2]

2. Petitioner also renews his contention (Pet. 11-13) that the EPO that formed the basis for his prosecution under 18 U.S.C. 922(g)(8) was not issued after a hearing. That claim lacks merit and does not warrant review.

Section 922(g)(8)'s imposition of a firearm disability on a person who is subject to a restraining order requires only that the subject of the court order be given actual notice of the proceeding and an opportunity to participate. Here, petitioner received notice of the February 12, 2001, hearing in the form of the summons that was served on him on February 9, 2001. And, when petitioner appeared in court on February 12, 2001, he had the opportunity to present reasons why the court should not enter an order finding that he posed a credible threat to the safety of his wife and child. Indeed, petitioner's counsel actively participated at the February 12, 2001, hearing by seeking permission for petitioner to enter the marital residence to obtain personal items. Also, the court ordered petitioner to surrender his state permit to carry a concealed weapon, advised petitioner that he was to stay

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[2] Petitioner's reliance (Pet. 10-11) on *James Daniel Good Real Property*, *supra*, is misplaced. That decision held that, absent exigent circumstances, a residence cannot be seized by the government without affording the owner notice and an opportunity to be heard. See 510 U.S. at 52-54. The Court relied in part on the conclusion that the heightened interest in controlling one's home, *id.* at 53-54, outweighed the limited interest of the government in effectuating a pre-hearing seizure, *id.* at 56-59. Here, the opposite is true: the government's interest in ensuring that petitioner did not use his weapon to injure or kill his wife or child greatly outweighed his interest in his personal property.

out of Harrison County except to see his attorney, and told him that he might have to use another doctor temporarily because petitioner's wife worked at the local hospital. *Ibid.* Petitioner was certainly afforded an opportunity at that proceeding to argue that such safety precautions were unnecessary because he posed no threat to his wife.

Despite petitioner's contrary assertion (Pet. 12-13), the decision below does not conflict with the Fifth Circuit's decision in *United States* v. *Spruill*, 292 F.3d 207 (2002). In holding that the requirements of Section 922(g)(8) had not been met in that case, the court relied on the facts that no court proceeding occurred or was even scheduled before the issuance of the protective order. Rather, the subject of the order, who was illiterate and unrepresented by counsel, was simply presented with a prepared order at the District Attorney's Office and told where to sign if he agreed to the order. 292 F.3d at 209-212. And, consistent with the decision below, the Fifth Circuit in *United States* v. *Banks*, 339 F.3d 267 (2003), held that the hearing requirement in Section 922(g)(8)(A) is met when the defendant's "hearing was set for a particular date, he received notice of its * * *, and he appeared with his attorney on the date of his hearing," *id.* at 273, even when the protective order was entered without a contested hearing on the merits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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